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February 6, 2003

EX PARTE SUBMISSION VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Ex Parte* Submission in UNE Triennial Review;
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Today the attached letter from David Zesiger, Executive Director of the Independent Telephone & Telecommunications Alliance, and Stuart E. Polikoff, Director of Government Relations of the Organization for the Promotion and Advancement of Small Telephone Companies, is being hand-delivered to the commissioners. It concerns the above-referenced proceeding. Please direct any questions concerning this matter to me.

Respectfully submitted,

/s/ Karen Brinkmann
Karen Brinkmann

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Marsha MacBride
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Lisa Zaina
William Maher

February 6, 2003

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8 B201
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8 B115
Washington, D.C. 20554

The Honorable Michael Copps
Federal Communications Commission
445 12th Street, SW, Room 8 A302
Washington, D.C. 20554

The Honorable Kevin Martin
Federal Communications Commission
445 12th Street, SW, Room 8 A204
Washington, D.C. 20554

The Honorable Jonathan Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8 C302
Washington, D.C. 20554

Re: *Ex Parte* Submission (UNE Triennial Review Proceeding)
Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;
Implementation of the Local Competition Provisions of the Telecommunications
Act of 1997; Deployment of Wireline Services Offering Advanced
Telecommunications Capability - CC Docket Nos. 01-338; 96-98; and 98-147

Dear Commissioners:

The prospect of imminent Commission action in the UNE Triennial Review proceeding has occasioned a blizzard of paper concerning future UNE availability. In this blizzard, the Commission could easily lose its bearings with respect to the needs of rural consumers served by independent local exchange carriers. As the Commission prepares to act in this critical matter, ITTA and OPASTCO respectfully ask you to keep two reference points clearly in view.

First, the existing record in this proceeding requires that if the Commission intends to find an absence of impairment for any UNE based upon assessed competitive conditions in large markets, its finding must extend as well to all smaller markets. The

record evidence supplied by ITTA and others demonstrates that no point of competitive demarcation exists between exchanges as a result of size, alone. ITTA and OPASTCO's members now experience substantial facilities-based competition in exchanges with widely varying line counts – including competitive facilities in numerous exchanges with fewer than 500 lines.¹ Any manifest absence of impairment in large company markets is at least matched (if not exceeded) by the visible absence of impairment in independent company markets. If the Commission limits unbundled network elements in the former markets, it must do so -- to the same degree and for the same reasons -- in the latter markets.

Second, the provisions of the 1996 Act require that if the Commission intends instead to address UNEs (and other related matters) according to competitive standards applied on a market-by-market basis, it must adopt separate and distinct standards for assessing the smaller markets served by the independent companies. Congress has already recognized that the competitive potential in smaller markets varies substantially, both among small markets and in contrast to the markets served by the large incumbent carriers. Many of the competitive small markets identified in ITTA's submissions may never sustain more than the one competitor already present.

Such considerations moved Congress to adopt *a priori* limitations on small market UNE availability and specific tests for removing those limitations.² ITTA and OPASTCO note that these tests focus on detailed, market-specific issues. They thus parallel the D.C. Circuit Court's findings concerning granular analysis of market conditions.³ These congressionally imposed limitations on UNE provisioning continue in effect unless and until the defined market-specific tests are satisfied.

Accordingly, if the Commission intends to impose on all incumbents market-by-market tests for UNE availability, ITTA and OPASTCO urge the Commission to formulate and/or adjust those tests to accommodate the specific characteristics – the “granularity” – of the smaller markets served by independent local companies. Otherwise, those standards will fail twice – once under existing statutory prescription, and again under applicable judicial requirements. More importantly, undifferentiated standards will also fail the rural consumers in those small markets, whose welfare is the primary object of this proceeding.

Sincerely,

David W. Zesiger
Executive Director
Independent Telephone and
Telecommunications Alliance

Stuart E. Polikoff
Director of Government Relations
Organization for the Promotion and Advancement
of Small Telecommunications Companies

¹ See, e.g., *ex parte* presentation of Independent Telephone & Telecommunications Alliance in CC Dockets 01-338, 96-98 and 98-147 (February 6, 2003).

² 47 U.S.C. §251(f).

³ *United States Telecom Association v. FCC*, 290 F.3d 415, 425-26 (D.C. Cir. 2002).

cc: Marsha MacBride
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Lisa Zaina
William Maher